Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979

No. 79-1506

GEORGE A. LAGUTA, FRANK L. ALBERT,
RONALD J. MYSYK,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio

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TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The decision of the Court of Appeals below is in conflict with this Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), *Terry v. Ohio*, 392 U.S. 1 (1968) and *Mincey v. Arizona*, 437 U.S. 385 (1978) 5

II. The decision of the Court of Appeals below failed to follow this Court's decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) in applying the plain view exception to the warrant requirement of the Fourth Amendment 7

Conclusion 9

Appendix:

Order of the Supreme Court of Ohio overruling motion for leave to appeal (dated December 28, 1979) A1

Decision and Journal Entry of the Court of Appeals, Ninth Judicial District, affirming judgment of the Court of Common Pleas of Summit County (dated September 19, 1979) A2

Journal Entry of the Court of Common Pleas, Summit County, Ohio, holding imposition of sentence of George A. Laguta in abeyance pending appeal (dated January 9, 1979) A8

Journal Entry of the Court of Common Pleas, Summit County, Ohio, placing Frank L. Albert on probation (dated January 9, 1979) A10

Journal Entry of the Court of Common Pleas, Summit County, Ohio, placing Ronald J. Mysyk on probation (dated January 9, 1979) A12

Journal Entry of the Court of Common Pleas, Summit County, Ohio, granting motion to suppress as to four (4) counts of the indictment and denying motion to suppress as to one (1) count (dated September 29, 1978) A14

Finding and Order of the Court of Common Pleas, Summit County, Ohio, on Motion to Suppress (filed July 25, 1978) A15

Motion to Suppress filed in the Court of Common Pleas, Summit County, Ohio, on June 13, 1978 .... A20

TABLE OF AUTHORITIES

Cases

Byars v. United States, 273 U.S. 28 (1927) 8
Carroll v. United States, 267 U.S. 132 (1925) 6
Cook v. State, 215 S.C.2d 728 (1975) 8
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 7, 8
Katz v. United States, 389 U.S. 347 (1967) 5, 6
Mincey v. Arizona, 437 U.S. 385 (1978) 5, 6
Preston v. United States, 376 U.S. 364 (1964) 6
Rios v. United States, 364 U.S. 253 (1960) 6
Stanley v. Georgia, 394 U.S. 557 (1969) 8
State v. Keefe, 13 Wash. App. 829 (1975) 8
State v. Williams, 55 Ohio St. 2d 82 (1978) 8
Stoner v. California, 376 U.S. 483 (1964) 6
Terry v. Ohio, 392 U.S. 1 (1968) 5, 6
United States v. Berenguer, 562 F.2d 206 (2nd Cir., 1977) 8
United States v. Clark, 531 F.2d 928 (8th Cir., 1976) 8
United States v. Sokolow, 450 F.2d 324 (5th Cir., 1971) 8
Warden v. Hayden, 387 U.S. 294 (1967) 6
Wong Sun v. United States, 371 U.S. 471 (1963) 8

Constitutional Provisions

U.S. Const., amend. IV 2, 3, 7, 9
U.S. Const., amend. XIV, § 1 3

Supreme Court of the United States

October Term, 1979

No. .....

GEORGE A. LAGUTA, FRANK L. ALBERT,
RONALD J. MYSYK,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio

Petitioners, George A. Laguta, Frank L. Albert and Ronald J. Mysyk, pray that a writ of certiorari issue to review a judgment of the Court of Appeals for the Ninth Appellate District of Ohio entered in this proceeding on September 19, 1979, which judgment became final on December 28, 1979, when the Supreme Court of Ohio overruled Petitioners' Motion for Leave to Appeal.

OPINION BELOW

The Supreme Court of Ohio overruled Petitioners' Motion for Leave to Appeal from a decision of the Court of Appeals of the Ninth Appellate District of Ohio. The unreported decision of the Court of Appeals is printed in the Appendix, *infra,* A2. The Order of the Supreme Court

of Ohio is printed in the Appendix, *infra,* A1. The Finding and Order of the trial court is printed in the Appendix, *infra,* A15.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Appellate District of Ohio, was entered on September 19, 1979. The Supreme Court of Ohio overruled Petitioners' Motion for Leave to Appeal on the 28th day of December, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Is a police officer's attempt to locate the owner of a building which has been found unlocked during the night a sufficiently exigent circumstance upon which to base an unwarranted entry into said building?

II. Does the Fourth Amendment require the suppression of evidence where the evidence seized is an automobile license number, the incriminating nature of which is only apparent after the number is relayed to a police dispatcher who investigates and determines it to have been connected with a stolen automobile report and subsequently informs the officer at the scene of the same?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners seek review on Fourth Amendment grounds of a state court decision upholding a warrantless search and seizure of property found to be inside a building leased by the Petitioners.

On Sunday, April 2, 1978, at 1:52 a.m., an officer of the City of Mogadore Police Dept., while performing a routine door check within his district at 85 "A" Gilchrist Road, Mogadore, Summit County, Ohio, discovered an unlocked business establishment. He noticed an absence of padlocks from both the walk-in door and the overhead garage door. He also noticed wood splinters from the door giving the appearance that a padlock had been forced from the hasp, whereupon, suspecting a crime in progress, he entered the building. The officer ascertained that there was no one in the building and radioed his dispatcher to obtain a telephone number where he might reach the lessor of the building.

At that point, having already determined that there was neither a crime in progress nor any person in the building, and that the building was secure, he re-entered.

Again inside, he observed a green truck. He concluded that the truck may have been registered to the owner

or lessor of the building and, therefore, copied the license plate number from the truck and left the building to relay this information to his dispatcher. The dispatcher thereafter informed the officer that the license number had been reported as having been registered to a stolen vehicle.

The officer then entered a third time and copied license numbers and serial numbers from other vehicles in the building which were also determined to have been stolen.[1]

The Petitioners were jointly indicted on May 25, 1978. The indictment charged each Petitioner with five (5) counts of receiving stolen property.

On June 13, 1978, Petitioners filed a motion to suppress evidence alleging a violation of rights under the Fourth Amendment as made applicable to the states by virtue of the Fourteenth Amendment.

After a full hearing, the trial court, by an order entered September 29, 1978, granted the motion with respect to each of four (4) counts against the Petitioners. The Petitioners thereafter on October 17, 1978, entered pleas of no contest to the remaining charge against each, so as to enable them to appeal the trial court's refusal to sustain their motion as to the remaining count.

The Petitioners filed timely notices of appeal and submitted their constitutional claims by way of two (2) assignments of error, to the Court of Appeals of the Ninth Appellate District of Ohio. On September 19, 1979, the

1. Evidence gathered in this third entry was the basis for four (4) counts in the indictment. The trial court sustained Petitioners' motions to suppress with respect to these four (4) counts by an order entered September 29, 1978 (Appendix A14). Petitioners seek review only as to evidence gathered during the course of the second entry.

Court of Appeals returned its Decision and Journal Entry affirming the judgment of the trial court.

Petitioners filed an appeal of the decision of the Court of Appeals by filing a Motion for Leave to Appeal to the Supreme Court of Ohio. This motion was overruled by the Supreme Court in a one-line order entered on December 28, 1979.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN KATZ V. UNITED STATES, 389 U.S. 347 (1967), TERRY V. OHIO, 392 U.S. 1 (1968) AND MINCEY V. ARIZONA, 437 U.S. 385 (1978).

Petitioners herein argue that this Court's decisions in *Katz v. United States,* 389 U.S. 347 (1967), *Terry v. Ohio,* 392 U.S. 1 (1968) and *Mincey v. Arizona,* 437 U.S. 385 (1978), have not been observed by the Court of Appeals below.

The Court of Appeals in reviewing the decision of the trial court determined that in the second entry into the building, since the police officer was not looking for contraband or evidence of criminal activity, that a classic search and seizure situation did not exist[2] (Decision and Journal Entry, A4).

2. There were actually three separate entries and they will be referred to throughout on the following basis. The first entry occurred immediately after the police officer found the unlocked door, the splintered wood and other evidence of a possible forced entry. He entered solely to investigate for intruders and exited upon finding none. The second entry occurred when he went back into the building and copied a license plate number found on a green truck. The third and final entry occurred after he was notified by his dispatcher that the license number obtained in the second entry was registered to a reportedly stolen vehicle (See footnote 1 in Statement of Case).

After so finding, the Court of Appeals balanced the utility of the procedure used by the officer in attempting to secure the building against the Petitioners' expectations of privacy. The Court of Appeals thus determined that the search and seizure was justifiable.

Petitioners urge that any analysis of the protection afforded a citizen by the Fourth Amendment must begin with the premise that ". . . searches conducted outside the judicial process, without prior approval by [a] judge or magistrate are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." *Katz v. United States, supra,* p. 357; *Stoner v. California,* 376 U.S. 483 (1964); *Rios v. United States,* 364 U.S. 253 (1960).

The only plausible theory of an exception cognizable under the instant facts is the theory that the circumstances were sufficiently exigent to warrant disregard of the Fourth Amendment's ban against invasion of privacy. *Terry v. Ohio, supra; Warden v. Hayden,* 387 U.S. 294 (1967); *Preston v. United States,* 376 U.S. 364 (1964).

This Court has consistently limited exigent circumstances necessary to warrant such disregard to situations where there is a need to protect life or to avoid serious injury. *Mincey v. Arizona, supra,* pp. 393-395.

There were no such exigent circumstances in the case at bar. Even admitting the necessity of the first entry based upon probable cause to suspect criminal activity, there can be no doubt but that the second entry was predicated upon neither probable cause nor exigent circumstances.

Carroll v. United States, 267 U.S. 132 (1925) defined the probable cause essential for warrantless activity as more than a mere hunch. With regard to the second entry,

any question of the existence of probable cause had already been answered in the negative by the results of the first entry.

Petitioners therefore ask this Court to grant the writ for the reason that no exigent circumstances were shown which could in any manner justify the disregard of the Fourth Amendment's ban against invasion of privacy as occurred herein.

II. THE DECISION OF THE COURT OF APPEALS BELOW FAILED TO FOLLOW THIS COURT'S DECISION IN COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971) IN APPLYING THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

This Court has ruled that three elements are required before the plain view doctrine is applicable. First, the initial intrusion must be lawful; second, the discovery of evidence must be inadvertent and; third, the incriminating nature of the evidence must be immediately apparent to the seizing authority. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Petitioners herein question the lower court's ruling with respect to the third requirement. The Court of Appeals said, "[W]e believe that the incriminating nature was 'immediately apparent'. The innocent number was relayed to a dispatcher before it became incriminating evidence, of which the police were then immediately aware." Decision and Journal Entry, Appendix p. A7.

Petitioners urge this Court to observe the obvious fallacy in the logic of the Court of Appeal's decision. If the "innocent number" had to be relayed to a dispatcher who then had to conduct an investigation to determine ownership or the name of the registrant and the fact that

it had been reported as stolen at which point it took on the character of "incriminating evidence", all of which information had then to be transmitted back to the officer at the scene, then it could hardly have been "immediately apparent".

The plain view exception cannot be used to justify a warrantless search where upon mere inspection, the incriminating nature is not immediately apparent. *Coolidge v. New Hampshire, supra; Stanley v. Georgia,* 394 U.S. 557 (1969). In *Stanley,* Justice Stewart, joined by Justices Brennan and White, described the seizure of film to be "unwarranted and unconstitutional" and refused to apply the plain view exception because "the content of the film could not be determined by mere inspection." *Stanley,* p. 571.

Other lower courts in the application of *Coolidge, supra,* have similarly refused to enlarge this exception in a wide variety of situations where the incriminating nature of the evidence was only made manifest after subsequent investigation. *State v. Williams* (1978), 55 Ohio St. 2d 82 (automobile parts); *United States v. Clark* (8th Cir., 1976), 531 F.2d 928 (a pistol); *United States v. Berenguer* (2nd Cir., 1977), 562 F.2d 206 (a wallet); *Cook v. State* (1975), 215 S.Ct. 728 (a coin collection); *State v. Keefe* (1975), 13 Wash. App. 829 (a typewriter); *United States v. Sokolow* (5th Cir., 1971), 450 F.2d 324 (air-conditioner serial numbers).

Petitioners argue on the basis of the foregoing that the application of the plain view exception cannot be justified. That the property in question was ultimately shown to be stolen is immaterial. A search or seizure, illegal at its inception, cannot be made legitimate by the results thereof. *Byars v. United States* (1927), 273 U.S. 28; *Wong Sun v. United States* (1963), 371 U.S. 471.

Unless this Court is disposed to abandon the third requirement of the rule set forth in *Coolidge, supra,* Petitioner's writ should be granted.

CONCLUSION

The decision of the Court of Appeals of the Ninth Appellate District of Ohio is in direct conflict with this Court's holdings on the issue of the requisite probable cause necessary to search and on the issue of the requirements necessary to establish the legality of a seizure under the plain view exception to the Fourth Amendment's warrant requirement. The writ of certiorari should therefore issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL

(Dated December 28, 1979)

No. 79-1503

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

GEORGE LAGUTA *et al.*,
Appellants.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

It is ordered by the Court that this motion is overruled.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO

(Dated September 19, 1979)

C.A. Nos. 9180, 9345, 9346

IN THE COURT OF APPEALS

NINTH JUDICIAL DISTRICT

STATE OF OHIO,
SUMMIT COUNTY, ss:

STATE OF OHIO,
Plaintiff-Appellee,

v.

GEORGE LAGUTA, FRANK L. ALBERT,
RONALD J. MYSYK,
Defendants-Appellants.

DECISION AND JOURNAL ENTRY

These causes were heard August 6, 1979, upon the record in the trial court and the briefs. They were argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, *P.J.*

Defendants-appellants, George Laguta, Frank Albert, and Ronald Mysyk appeal from findings of guilty after their no contest pleas to charges of receiving stolen property. (R.C. 2913.51).

"I. The entry by police officers without a warrant into the garage at 85 Gilchrist Road, Mogadore, Ohio, violated appellant's rights under the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. The failure of the trial court to suppress all evidence obtained therefrom further impinged on these rights and constitutes reversible error.

"II. The discovery, without a warrant, of the evidence here in question cannot be justified by the application of the Plain View Doctrine. Hence, there was an unreasonable search and seizure and the trial court's failure to suppress all evidence obtained therefrom was error in that it deprived appellants of the protection afforded them by the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution."

Around 2:00 on the morning of April 2, 1978, a Mogadore police officer discovered an unlocked business establishment at 85A Gilchrist Road as he performed a routine door check. He noticed padlocks missing from both the walk-in door and the overhead garage door. He also noticed some of the wood on the door was splintered, and he testified it appeared as if someone had forced the padlock from the hasp. The officer was familiar with the usual appearance of the door because of door checks on many prior occasions, including a check he made two days before the day in question.

The officer entered the premises for the purpose of seeing whether there was a burglary in progress. After he was satisfied that no one else was inside, he exited and contacted the police dispatcher in an attempt to locate the name of someone who might lock the building. The dis-

patcher had no night security number and did not know the name of the owner of the business. The officer made a further check of his own list of phone numbers, but did not have the information. Recalling a green truck inside the building and concluding that the truck was probably registered to the owner of the company, he re-entered, copied the license plate number and relayed this new information to the dispatcher. The dispatcher told the officer that the license number had been reported as belonging to a stolen vehicle. The actions of the police after this point are irrelevant to this appeal, as they formed the grounds for a successful defense motion to suppress certain evidence in the trial court. Defendants' receiving convictions were based solely on the green truck.

The first assignment of error presents the issue of the legality of the entry of police into the premises. There can be no doubt but the police had probable cause to enter that building the first time. He had discovered unlocked doors of a business establishment at 2:00 A.M. and detected some signs of forced entry. Considering the totality of the circumstances, the police officer had probable cause to enter and investigate for intruders. *State v. Bell,* C.A. #8496, (9th Dist. Ct. App., Feb. 23, 1978) M.C.O. June 16, 1978. However, this entry and cursory "search" for intruders produced no incriminating evidence. It is the warrantless re-entry, and the "search" which led to the "seizure" of the license plate number of the stolen truck, which is in question. We use these terms somewhat cautiously, as the facts in this case do not present a classic "search and seizure" situation. A search ordinarily implies an examination of an individual or of his property to discover contraband or evidence of some violation of the law, to be used in prosecution of a criminal action. *Marshall v. United States,* 422 F. 2d 185 (1970). The officer here did not suspect (on his re-entry into the building) and was not seeking any evidence of crime. However, lesser intrusions into constitutionally protected privacy, that is, something less than a full-blown investigatory search, are within the purview of the Fourth Amendment. The United States Supreme Court has rejected over-technical distinctions between various degrees of police intrusions as a basis for excepting them from any constitutional scrutiny. *Terry v. Ohio,* 392 U.S. 1 (1968).

Although we view the facts as presenting a Fourth Amendment question, it is apparent that the case does not lend itself to analysis under the traditional warrantless search framework, i.e. either fitting the case into one of the "jealously and carefully drawn" exceptions to the warrant requirement or finding it to be an abridgement of defendant's Fourth Amendment rights. *Jones v. United States,* 357 U.S. 493, 499 (1958). The protection provided by the warrant requirement is that a neutral magistrate, and not a law enforcement agent "engaged in the often competitive enterprise of ferreting out crime," determine reasonable ground for belief that an offense has been or is being committed. *Johnson v. United States,* 333 U.S. 10, 14 (1948). The instant facts do not posit a situation where the officer entered to secure evidence of an offense. His only purpose, at the time in question, was to protect private property. A magistrate could have no purposeful role under these facts, as there was no determination of "probable cause" in the sense that the term is used in search and seizure cases, to be made.

The essential purpose of the Fourth Amendment is the protection of citizens from unreasonable governmental intrusions into their privacy. Under these peculiar facts, whether there was an abridgement of defendant's constitutionally protected right to be free from unreasonable searches must hinge on the reasonableness of the second entry. What was the defendant's justifiable expectation

of privacy under these circumstances? Justice Harlan's dissenting opinion in *United States v. White,* 401 U.S. 745, 786 (1971) suggests the perimeters of this inquiry:

"* * *

"This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary."

To be specific, the practice in question is police entry of business premises found and unlocked at night for the limited purpose of obtaining a license plate number from a vehicle, known to be within, in order to contact the owner to secure his doors. The private interest involved is a businessman's right to keep police out of his business premises after hours. The public interest is the people's right to have their police perform their duty in securing and protecting all private property. On balance, we believe that the utility of the practice outweighs the invasion of privacy, which we do not see as an intolerable encroachment upon the people's sense of security. Indeed, we might venture so far as to suggest that the majority of citizens would desire the police to go to these lengths to protect their property.

We, therefore, hold that the second entry was lawful and reject the first asignment of error.

Holding as we do in regard to the legality of the entry, it follows that the policeman had a right to be

where he was when he saw the license plate. Thus, the first requirement of the three part "plain view" test set forth in *State v. Williams,* 55 Ohio St. 2d 82 (1978) is satisfied. We believe that the facts support a holding that the discovery of the evidence was inadvertent at the time the number was "seized" since it was not then known to be evidence of any crime. The officers stumbled upon evidence of a stolen vehicle while looking for a way to secure the premises.

Finally, we believe that the incriminating nature was "immediately apparent." The innocent number was relayed to a dispatcher before it became incriminating evidence, of which the police were then immediately aware. We hold the evidence was in "plain view" of the seizing officer and was properly admitted at trial. The second assignment of error is rejected.

This court is not unaware that there is some potential for police abuse here. We think it is important to note that the police did not rummage for something to identify the owner of the premises. They knew, because of a prior lawful entry, that a truck was parked in the bay area. They reasonably concluded that the license plate would help them identify and call the owner. There is no evidence of pretext, an avenue that was carefully explored by defense counsel on cross-examination. We see this decision as a very narrow ruling resting on the particular circumstances of this case.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry these judgments into execu-

tion, shall issue out of this court in each case. A certified copy of this journal entry shall constitute the mandate in each case, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment in each case, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run in each case. App. R. 22(E).

Costs taxed to appellants.

Exceptions.

/s/ SAM H. BELL

Presiding Judge for the Court

VICTOR, J. and MAHONEY, J. concur.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS RE GEORGE LAGUTA

(Dated January 9, 1979)

No. CR 78 4 455

COURT OF COMMON PLEAS

THE STATE OF OHIO,
SUMMIT COUNTY, SS:

THE STATE OF OHIO,

vs.

GEORGE LAGUTA (A).

JOURNAL ENTRY

THIS DAY, to-wit: The 9th day of January A.D., 1979, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, GEORGE LAGUTA, be-

ing in Court with counsel, DOMINIC MUSITANO, for sentencing, having heretofore on October 17, 1978, plead NO CONTEST to and been found GUILTY by the Court of RECEIVING STOLEN PROPERTY, as contained in Count Number Five (5) of the Indictment against him herein.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that the Defendant, GEORGE LAGUTA, be imprisoned and confined in the OHIO STATE PENITENTIARY at Columbus, Ohio, for an indeterminate period of not less than ONE (1) YEAR and not more than the maximum of FIVE (5) YEARS for punishment of the crime of RECEIVING STOLEN PROPERTY, Ohio Revised Code Section 2913.51, a felony of the fourth (4th) degree, and that he pay the costs of this prosecution for which judgment is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

THEREUPON, IT IS THE FURTHER ORDER OF THE COURT that imposition of sentence be held in abeyance pending the appeal in this matter and the Defendant was released on the same bond which is continued as an appeal bond.

JOHN W. REECE, *Judge*
Court of Common Pleas
Summit County, Ohio

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS RE FRANK L. ALBERT

(Dated January 9, 1979)

No. CR 78 4 455

COURT OF COMMON PLEAS

THE STATE OF OHIO,
SUMMIT COUNTY, SS:

THE STATE OF OHIO,

vs.

FRANK L. ALBERT (B).

JOURNAL ENTRY

THIS DAY, to-wit: The 9th day of January A.D., 1979, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, FRANK L. ALBERT, being in Court with counsel, DOMINIC MUSITANO, for a hearing on the pre-sentence investigation report heretofore ordered on October 17, 1978, at which time the Defendant plead NO CONTEST to and was found GUILTY by the Court of RECEIVING STOLEN PROPERTY, as contained in Count Number Five (5) of the Indictment against him herein.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that the Defendant, FRANK L. ALBERT,

be imprisoned and confined in the OHIO STATE PENITENTIARY at Columbus, Ohio, for an indeterminate period of not less than ONE (1) YEAR and not more than the maximum of FIVE (5) YEARS for punishment of the crime of RECEIVING STOLEN PROPERTY, Ohio Revised Code Section 2913.51, a felony of the fourth (4th) degree.

THEREUPON, IT IS THE FURTHER ORDER OF THE COURT that imposition of sentence be and the same hereby is suspended and the Defendant placed on probation for a period of THREE (3) YEARS upon the following terms and conditions, to-wit:

1. That he report to the Adult Probation Department as directed and abide by the rules and regulations and conditions of probation as set by the Adult Probation Department and/or the Adult Parole Authority.

2. That he refrain from offensive conduct of every nature and obey all laws.

3. That he serve SIXTY (60) DAYS in the Summit County Jail.

4. That he pay the costs of this prosecution within SIXTY (60) DAYS after his release from the Summit County Jail; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

AND THIS SAME DAY, to-wit: The 9th day of January A.D., 1979, the Court further orders that imposition of the sentence be held in abeyance pending the appeal in this matter and the Defendant was released on the same bond which is continued as an appeal bond.

SAID PROBATION TO COMMENCE ON A DATE TO BE SET BY A FURTHER ORDER OF THIS COURT.

JOHN W. REECE
Presiding Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS RE RONALD J. MYSYK

(Dated January 9, 1979)

No. CR 78 4 455

COURT OF COMMON PLEAS

THE STATE OF OHIO,
SUMMIT COUNTY, SS:

THE STATE OF OHIO,

vs.

RONALD J. MYSYK (C).

JOURNAL ENTRY

THIS DAY, to-wit: The 9th day of January A.D., 1979, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, RONALD J. MYSYK, being in Court with counsel, DOMINIC MUSITANO, for a hearing on the pre-sentence investigation report heretofore ordered on October 17, 1978, at which time the Defendant plead NO CONTEST to and was found GUILTY by the Court of RECEIVING STOLEN PROPERTY, as contained in Count Number Five (5) of the Indictment against him herein.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that the Defendant, RONALD J. MYSYK,

be imprisoned and confined in the OHIO STATE PENITENTIARY at Columbus, Ohio, for an indeterminate period of not less than ONE (1) YEAR and not more than the maximum of FIVE (5) YEARS for punishment of the crime of RECEIVING STOLEN PROPERTY, Ohio Revised Code Section 2913.51, a felony of the fourth (4th) degree.

THEREUPON, IT IS THE FURTHER ORDER OF THE COURT that imposition of sentence be and the same hereby is suspended and the Defendant placed on probation for a period of THREE (3) YEARS upon the following terms and conditions, to-wit:

1. That he report to the Adult Probation Department as directed and abide by the rules and regulations and conditions of probation as set by the Adult Probation Department and/or the Adult Parole Authority.

2. That he refrain from offensive conduct of every nature and obey all laws.

3. That he serve SIXTY (60) DAYS in the Summit County Jail.

4. That he pay the costs of this prosecution within SIXTY (60) DAYS after his release from the Summit County Jail; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

AND THIS SAME DAY, to-wit: The 9th day of January A.D., 1979, the Court further orders that imposition of the sentence be held in abeyance pending the appeal in this matter and the Defendant was released on the same bond which is continued as an appeal bond.

SAID PROBATION TO COMMENCE ON A DATE TO BE SET BY A FURTHER ORDER OF THIS COURT.

JOHN W. REECE
Presiding Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS RE MOTION AND INDICTMENTS

(Dated September 29, 1978)

No. CR 78 4 455

COURT OF COMMON PLEAS

THE STATE OF OHIO,
SUMMIT COUNTY, SS:

THE STATE OF OHIO,

vs.

GEORGE A. LAGUTA (A), FRANK L. ALBERT (B), RONALD J. MYSYK (C).

JOURNAL ENTRY

THIS DAY, to-wit: The 29th day of September A.D., 1978, upon due consideration of the Court and for good cause shown, IT IS HEREBY ORDERED that the Defendants' Motion to Suppress be GRANTED as to Count Numbers One (1), Two (2), Three (3) and Four (4) of the Indictment and DENIED as to Count Number Five (5) of the Indictment against them herein.

JOHN W. REECE,
Presiding Judge

FINDING AND ORDER OF THE COURT OF COMMON PLEAS ON MOTION TO SUPPRESS

(Dated July 25, 1978)

Case No: CR 78 04 0455A,B,C

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

GEORGE A. LAGUTA, FRANK L. ALBERT, RONALD J. MYSYK,
Defendants.

FINDING AND ORDER

This cause came on to be heard upon the Defendants' Motion to Suppress, filed herein on June 13, 1978. A hearing was held on June 27, 1978, followed by oral argument and briefs from counsel for the State and the Defendants.

The facts were testified to at the hearing and have been reiterated in the briefs, so only those pertinent portions will be repeated as needed.

As recently as July 12, 1978, in the case of *State v. Williams*, 55 O.S. 2d 82, Ohio Bar Report of July 17, 1978, the Ohio Supreme Court again stated the requirements to be met as follows:

> "In order for evidence to be seized under the plain view exception to the search warrant requirement, it must be shown that (1) the initial intrusion which

afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and, (3) the incriminating nature of the evidence was Immediatley apparent to the seizing authorities."

These requirements will be examined in order. As did the Supreme Court in *Williams,* supra, this Court has no difficulty in finding that the first requirement, a lawful initial intrusion, was clearly met. The police officer went into the building after seeing persuasive evidence of a possible breaking and entering. Finding nobody inside, the officer had the right, if not the duty, to take action to protect the property.

This concept is best summarized by language of the United States Sixth Circuit Court of Appeals in *U.S. v. Langley,* 466 F. 2d 27, at page 34 (1972):

"We think that such circumstances not only warrant, *but mandate* police action which may involve limited intrusions of the 'privacy' of the premises. Here, the intrusions upon the Langley premises were geared to protect the privacy and security of the premises; they were directed not at Langley or other occupants of the house, but rather at suspected burglars." (Emphasis added).

The second requirement, an inadvertent discovery, was also clearly satisfied. Officer Rushin did not enter the premises with any intention to search (other than for burglars) or seize. He did not know, prior to the entry, that the Defendants were in possession of any stolen property, or that any such was located inside the premises. It was only when he radioed the license plate numbers back to the dispatcher, in an effort to identify or locate the owner of the premises, that he discovered that the truck license plate was listed as stolen. This action was

taken in an effort to protect the security of the property, not to seize it.

That brings the inquiring to the third requirement, which is: Was the incriminating nature of the vehicles and parts immediately apparent to Officer Rushin and his partner, Officer Arnold?

In setting forth the three requirements listed above, the Ohio Supreme Court relied upon earlier language of the U. S. Supreme Court in the case of *Coolidge v. New Hampshire* (1971) 403 U.S. 443, wherein Justice Stewart, addressing himself to the third requirement, stated on page 446:

"Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have *evidence* before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another *until something incriminating at last emerges.*" (Emphasis supplied).

The testimony of Officer Rushin at the evidentiary hearing reveals that following his entry into the premises and before his inadvertent discovery of the stolen nature of the vehicles and parts, he saw the green Ford pickup truck, observed the two cars on jacks behind a hanging canvas. The engine and vehicle frames were in the same general area.

After observing these items, in what has been determined to be a permissible manner, the two officers learned that at least the pickup truck was carrying stolen license plates. In passing, it should be noted that the whole purpose of the State in requiring license plates to be on a motor vehicle is to provide easily obtainable owner identification.

The Court has cited the *Williams* case, and it must be pointed out that not only does that case contain some similarities to this case, but there, the trial court, the appellate court, and the Supreme Court all sustained a motion to suppress based upon the third requirement as outlined. The Supreme Court held that, although the first two requirements had been met, at the time of the seizure, the incriminating nature of the automobile body parts was not immediately apparent to the officer.

That case has some applicability here. In the instant case, the whole approach of the first two officers was not investigatory in nature, other than to look for burglars. Officer Rushin did not conduct any investigation or make any inquiries for the purpose of determining that the pickup truck was stolen. However, when he was told that the license number was listed as having been stolen, no speculation is required to conclude that it was immediately apparent to him, as a policeman, that he had "evidence" before him with regard to the truck. He would have to be incompetent not to draw that immediate conclusion. It can be said, with regard to the pickup truck, that the incriminating nature of the evidence was immediately apparent.

The same cannot be said about the rest of the items in question.

After receiving the stolen vehicle report on the radio, the two officers, and later the Chief of Police, went back into the building and conducted a general exploratory search from one object to another, which resulted in incriminating evidence.

In addition, there was time to obtain a search warrant even though two legal advisors counseled the police against the necessity of obtaining one.

These actions fall within the restrictions set forth by the Ohio Supreme Court in the *Williams* case.

Accordingly, the Motion to Suppress is hereby overruled with regard to the Ford Pickup Truck which forms the basis of the charge in Count Five (5) of the indictment. However, the Motion is hereby sustained as to the items which form the basis of the charges in the first four Counts of the indictment and to any other items or evidence seized by the police on July 2 and 3, 1978.

IT IS SO ORDERED.

Exceptions to all parties.

JOHN W. REECE
Judge

MOTION TO SUPPRESS FILED IN THE COURT OF COMMON PLEAS

(Filed June 13, 1978)

Case No. 78-04-0455A, B, C

Judge John W. Reece

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs

GEORGE A. LAGUTA,
et al.,
Defendants.

MOTION TO SUPPRESS

Now come the defendants, George A. Laguta, Ronald J. Mysyk and Frank L. Albert, by and through their attorney, Dominic A. Musitano, Jr., and respectfully move the Court for an order suppressing all evidence taken from the garage located at 85 Gilchrist Road, Mogadore, Ohio, on the grounds that such evidence was obtained in violation of defendants' constitutional rights.

/s/ DOMINIC A. MUSITANO, JR.
524 Centran Building
Akron, Ohio 44308
(Telephone: 535-5535)
Attorney for Defendants

BRIEF IN SUPPORT OF MOTION TO SUPPRESS

The Police Officers on General Duty Had No Probable Cause to Enter the Garage at 85 Gilchrist Road, Mogadore, Ohio: Therefore, the Evidence Obtained Therefrom Should be Suppressed.

The United States Supreme Court has repeatedly construed the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .

to the effect that evidence which is obtained as the result of an unconstitutional search is inadmissible in subsequent criminal proceedings against the defendant. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Among the exceptions to the warrant requirement of the Fourth Amendment, and the only theories to justify the search in issue, are the emergency doctrine, *U.S. v. Goldstein*, 456 F. 2d 1006 (8th Cir. 1962); and the doctrine of probable cause plus exigent circumstances, *Schmerber v. California*, 384 U.S. 757 (1966).

Situations which pose "an imminent threat to life, health or property . . ." (per *People v. Smith*, 7 Cal. 3d 282, 696 P. 2d 1261, 101 Cal. Rptr. 893 (1972) justify the application of the emergency doctrine. Indeed, the great majority of cases involving this theory only permit warrantless entries when life is apparently in danger. See *People v. Williams*, 557 P. 2d 399 (Colo. 1976); *People v. Lovitz*, 39 Ill. App. 3d 624, 350 N.E. 2d 276 (1976); and *State v. Hyde*, 26 Ohio App. 2d 32, 268 N.E. 2d 820 (Summit Cy. 1971).

Terry v. Ohio, 392 U.S. 1 (1968) set forth the standard that circumstances must be "sufficiently exigent to war-

rant disregard for the Fourth Amendment's ban against invasion of privacy." This guideline was reiterated in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), where the Court, referring to the exceptions to the Fourth Amendment's warrant requirement, asserts, "the exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative."

In the case under consideration, no emergency and no exigent circumstances existed. The police officers claim they suspected a felony was taking place. However, no informant directed their attention to the garage at 85 Gilchrist Road; there was no sign of forced entry into the garage; they heard no noise from within the building indicating anyone's presence; they observed no suspicious individual entering or leaving the garage at the time of their alleged observation of the door ajar while on general duty. This observation formed the basis for their warrantless entry and search of the garage.

Carroll v. U.S., 267 U.S. 132 (1925) defined the "probable cause" essential for warrantless activity as more than a "hunch", i.e., specific facts are needed to support a reasonable belief that criminal activity is taking place. If the officers in the present case actually had a "reasonable belief" that criminal activity was afoot, they could easily have secured the garage, maintained a lookout, and obtained a warrant, thereby complying with constitutional mandates. Even if probable cause had been established, no amount of probable cause can justify a warrantless search in the absence of exigent circumstances. *Coolidge (supra)*

In the present case, there is clearly no justification for the original entry. All that is admitted is a "door ajar". No emergency nor any exigent circumstances have been

established. Therefore, the fruits of this illegal search should be suppressed. (See *Mapp, supra*)

The "Plain View" Doctrine Is Inapplicable to the Case Under Consideration Because There Is No Justification For the Officers' Original Entry; Therefore, the Evidence Should Be Suppressed.

Coolidge (*supra*) emphasized the requirement that police officers who attempt to justify the discovery of evidence on the "plain view" doctrine must first of all have had a right to be in a position to observe the evidence in question, that is, there must be a prior justification for the intrusion.

According to *U.S. v. Sokolow,* 450 F. 2d 324 (5th Cir. 1971), it also must be immediately apparent to the police that they have evidence before them. This safeguard against a general, exploratory search is illustrated in the case *United States v. Gray,* 484 F. 2d 352 (6th Cir. 1973) where a police officer executing a valid warrant authorizing seizure of alcoholic beverages, observed three rifles in defendant's closet and copied their serial numbers. After the numbers were checked, the rifles were determined to be stolen. In a trial of defendant for possession of the stolen rifles, they were suppressed, on the grounds that it could not be immediately apparent to the officer, upon viewing the guns, that they were evidence of a crime. In the case under consideration, the same argument is applicable. It is plainly impossible for the officers to have ascertained, purely on the basis of their observation, that a crime was in evidence.

The *Coolidge* court defined two additional requisites for the application of the plain view doctrine. They are that the discovery must be inadvertent; and that what is discovered must be evidence incriminating the defendant. Because the officers had to call and check serial

numbers of the vehicles observed, their observation does not appear to be "inadvertent" within the meaning of *Coolidge*.

The officers had no legal right to make the initial entry, therefore, doctrine of plain view does not apply; suppression of the evidence is mandated by the illegality of the search.

CONCLUSION

It is clear that the police officers had no right to enter the garage at 85 Gilchrist Road on or about April 3, 1978. The search cannot be justified under any circumstances; it is constitutionally impermissible.

The cases cited deal primarily with Fourth Amendment issues which apply to the states via the Due Process clause of the Fourteenth Amendment. These cases deal specifically with the facts of the case in issue and require the conclusion that suppression must be ordered.

Respectfully submitted,

/s/ DOMINIC A. MUSITANO, JR.
Attorney for Defendants

CERTIFICATION

I hereby certify that a copy of the foregoing Motion to Suppress was forwarded to Mr. James A. Rudgers, Assistant County Prosecutor, City-County Safety Building, Akron, Ohio 44308, this 13th day of June, 1978.

/s/ DOMINIC A. MUSITANO, JR.
Attorney for Defendants

Supreme Court, U. S.
FILED
APR 25 1980
JR., CLERK

Supreme Court of the United States

October Term, 1979
No. 79-1506

GEORGE A. LAGUTA, FRANK L. ALBERT,
RONALD J. MYSYK,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities I

Statement of the Case 1

Respondent's First Reason for Denying the Writ:

A Police Officer Does Not Conduct an Unreasonable Search in Taking an Automobile's License Number to Locate the Owner of the Building Into Which an Apparently Unlawful Entry Has Been Made 3

Respondent's Second Reason for Denying the Writ:

A Police Officer's Observation of a License Number of an Automobile, Which He Relays to the Dispatcher to Determine the Owner of the Building Which He Suspects Has Been Unlawfully Entered Falls Within the "Plain View" Exceptions to the Requirement for a Warrant 4

Conclusion 6

TABLE OF AUTHORITIES

Cases

Cady v. Dombrowski, 413 U.S. 433 (1973) 3

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 3, 4, 5

Cooper v. California, 386 U.S. 58 (1967) 3

Harris v. United States, 390 U.S. 234 (1968) 3

Johnson v. United States, 333 U.S. 10 (1948) 5

Kremen v. United States, 353 U.S. 346 (1957) 4

Marron v. United States, 275 U.S. 192 (1927) 4

Michigan v. Tyler, 436 U.S. 499 (1978) 5, 6
Stanley v. Georgia, 394 U.S. 557 (1969) 4
Terry v. Ohio, 392 U.S. 1 (1968) 3

Constitutional Provisions

United States Constitution, Amendment IV 3, 6

Supreme Court of the United States

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GEORGE A. LAGUTA, FRANK L. ALBERT,
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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent respectfully submits the following additions to the statement of the case.

At 85"A" Gilchrist Road, a business identified as the Expo Construction and Expo Service Company was checked, and it was visibly noticeable that the padlock which normally secured the entrance door was not on the hasp. The building was dimly lit and the padlock was missing from the garage door. It appeared to the officer that the lock

had been forced off because wooden splinters were missing from the door. Officer Rushin turned the handle to the entrance door and found it was unlocked. He entered the building to check for a burglary in progress and noticed several automobile parts, a blue inverted truck cab, tools and wires lying in front of him. In further checking the area he found a green pickup truck, two automobiles sitting on jack stands with numerous body parts around, acetylene torches and other miscellaneous parts. He did not find anyone in the building at that time.

Patrolman Rushin then communicated to the radio operator of the Mogadore Police Department his findings and asked him to contact someone through Public Service to come to the premises to determine if anything was missing from the building and to secure the building. The radio dispatcher advised Rushin that he had no information on that business nor a night security number to contact the owners of the building. Rushin checked his own night security numbers and did not find a listing for the Expo Construction Company. He then re-entered the building to ascertain the license number on the green pickup truck inside the garage in order for the radio dispatcher to see if he could locate the owner. The dispatcher found that the truck had been reported as stolen.

Rushin then returned to the truck and noticed that the ignition lock switch was removed from the dashboard and confirmed that the license plate number corresponded with the vehicle identification number. In checking a vehicle engine which was lying on the floor, the officer found that the vehicle identification number had been buffed from the motor. Officer Rushin also examined the automobile parts which he had earlier observed.

RESPONDENT'S FIRST REASON FOR DENYING THE WRIT

A Police Officer Does Not Conduct an Unreasonable Search in Taking an Automobile's License Number to Locate the Owner of the Building Into Which an Apparently Unlawful Entry Has Been Made.

Respondent agrees with counsel for Petitioners' that the "search and seizure" in the instant case cannot be grounded in the "probable cause and exigent circumstances" exceptions to the warrant provision of the Fourth Amendment to the United States Constitution.

The actions of the police officer were undeniably not within the usual rubric of a "search and seizure." Officer Rushin was not conducting "a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971).

Rather he was attempting to protect private property. The court has previously recognized a community caretaking function which allows this type of police conduct. *Accord, Cady v. Dombrowski*, 413 U.S. 433 (1973), *Harris v. United States*, 390 U.S. 234 (1968), and *Cooper v. California*, 386 U.S. 58 (1967).

While the officers intent, or good faith is not the *sine qua non* of a justifiable intrusion, certainly here his motives cannot be questioned. The courts have established a balancing test weighing the extent of the intrusion against the need for the search. *Terry v. Ohio*, 392 U.S. 1 (1968).

Here the intrusion was extremely limited in both duration and scope. Officer Rushin spent only a few moments to observe a license number. This is in sharp contrast to

an extended rummaging for hours through every possession contained in, or out of sight. *Compare, Marron v. United States,* 275 U.S. 192 (1927), *Cf. Kremen v. United States,* 353 U.S. 346 (1957).

Respondent respectfully requests this court to apply the community caretaker theory to the facts of this case.

RESPONDENT'S SECOND REASON FOR DENYING THE WRIT

A Police Officer's Observation of a License Number of an Automobile, Which He Relays to the Dispatcher to Determine the Owner of the Building Which He Suspects Has Been Unlawfully Entered Falls Within the "Plain View" Exceptions to the Requirement for a Warrant.

Respondent submits that the search conducted herein fits within the test enunciated in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). It is beyond cavil that Officer Rushin was lawfully on the premises, and that the evidence was discovered inadvertently. Petitioners do not contest the officer's lawful purpose. Nor can it be said that he was in any sense looking for evidence of a crime.

Petitioners contend however that the incriminating nature of the evidence was not immediately apparent. *Coolidge v. New Hampshire, supra,* at 468 and *Stanley v. Georgia,* 394 U.S. 557 (1969). Respondent disagrees with this analysis. There was no extensive search, or rummaging through the building to locate evidence of a crime. It is a simplistic view to say that a short span of time to relay the license number to the dispatcher negates the third prong of the *Coolidge* test.

The Court points out in *Coolidge v. New Hampshire, supra* at 467:

> The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause.
>
> . . . .
>
> The second distinct objective is that those searches deemed necessary should be as limited as possible.

It is readily apparent that this rationale applies to the facts of the instant case. The officer did not enter the premises armed with probable cause in the "competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Second the intrusion into the premises was as limited as the circumstances could require. Under these circumstances the Respondent submits that the "plain view" doctrine has no clear application.

Michigan v. Tyler, 436 U.S. 499 (1978), seems particularly applicable here. In that case firefighters responding to an alarm removed two containers of flammable liquid from the premises while extinguishing the blaze. The court not only sustained that seizure, but went on to hold that as part of their firefighting function, officials could remain in the building, or re-enter it to determine the cause of the fire. Accordingly, evidence seized while inspecting the premises for these purposes is constitutional. *Michigan v. Tyler, supra,* at 510.

The court went on to hold that warrantless entries days after the fire were unconstitutional, and evidence seized was properly suppressed. *Id.* at 511.

In the instant case the trial court granted the motion to suppress as it related to other vehicles, or parts, beyond the vehicle identified initially as stolen by the radio dispatcher. This determination is analogous to *Michigan v. Tyler, supra.* The first object seized was within the framework of the officer's duties vis-a-vis the community. The additional search and seizure can be attributed to his criminal investigative function, and the State concedes that the evidence therefrom should be suppressed.

Accordingly, the Respondent submits that pursuant to the arguments presented above, the search must be sustained.

CONCLUSION

The protections afforded by the Fourth Amendment are not affronted by the very limited intrusion, into the Petitioners' privacy for the benign, or even laudable purpose of protecting their business property. Application of the exclusionary rule to this case would have absolutely no deterrent effect on a police officer's conduct, and would be detrimental to societal interests and their expectations of proper police conduct.

Respectfully submitted,

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